FOR ARGUMENT

No. 04-905

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

VOLVO TRUCKS NORTH AMERICA, INC.
Petitioner,

v.

REEDER-SIMCO GMC, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION, AMERICAN BOOKSELLERS ASSOCIATION, SERVICE STATION DEALERS OF AMERICA AND ALLIED TRADES, NATIONAL DISTRIBUTION CONTRACTING, INC., GROGAN'S HEALTHCARE SUPPLY, CLAFLIN COMPANY, AMERICAN MEDICAL DEPOT, ALL MED MEDICAL SUPPLY, LLC, AND MIDLAND MEDICAL SUPPLY CO. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

WAYNE A. MACK *
J. MANLY PARKS
JAMES H. STEIGERWALD
DUANE MORRIS LLP
One Liberty Place
Philadelphia, PA 19103
(215) 979-1000

* Counsel of Record

Counsel for Amici Curiae

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether Robinson-Patman Act liability may be imposed where the favored purchaser and the disfavored purchaser sold products of like grade and quality to customers located in the same geographic area during the same time period and engaged in periodic head-to-head competition on the same deals.

2. Whether Robinson-Patman Act liability may be imposed where the seller offers a price to a disfavored dealer in a competitive bidding situation but the disfavored dealer loses the bid to another dealer who received a more favorable price from the seller, where the disfavored dealer has also made contemporaneous purchases of other similar products from the seller at prices higher than those offered by the seller to the favored dealer.

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INTEREST OF *AMICI CURIAE* [1]

The American Booksellers Association ("ABA") is a non-profit industry association founded in 1900 that promotes

[1] *Amici curiae* have filed letters with the Clerk of the Court by which Petitioner and Respondent have consented to the filing of this brief. Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici curiae*, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief.

independent bookstores. Members of the ABA compete on a regular basis with large national distributors such as Barnes & Noble and Amazon.com. The ABA and its members strongly support legislation which enables independent small businesses to compete on equal footing with national chain stores.

The North American Equipment Dealers Association ("NAEDA") was founded September 21, 1900, and is committed to building the best business environment for North American equipment dealers who sell agricultural, construction, industrial and outdoor power equipment in the United States and Canada. NAEDA is a non-profit industry association that has over 5,000 members with 18 affiliated state, regional and provincial associations.

Grogan's Healthcare Supply, The Claflin Company, Midland Medical Supply Co., Ameri an Medical Depot, National Distribution & Contracting, Inc. and All Med Medical Supply LLC are regional distributors of a wide range of healthcare supplies and equipment to hospitals, nursing homes, physicians, allied health providers and consumers. These distributors purchase from hundreds of major medical manufacturers and resell products to many thousands of healthcare providers throughout the United States. These distributors often compete with much larger national distribution organizations for business at the local and regional level. The ability to purchase goods at comparable costs to those competing national organizations is critical to the survival of their businesses.

The Service Station Dealers of America and Allied Trades ("SSDA") is a national nonprofit trade association which represents the interests of independent service station dealers located throughout the United States. SSDA, which was formed in 1948, represents 20 state and regional affiliates, which in turn represent over 15,000 independent dealers in over 25 states. These independent service station dealers have a vital interest in supporting legislation such as the Robinson-

Patman Act that enables them to compete fairly against larger national distributors.

SUMMARY OF ARGUMENT

The statutory language and the legislative history of the Robinson-Patman Act ("RPA") reveal that statute was intended to be prophylactic: to "catch the weed" of harm to competition "in the seed" of harm to an individual competitor. Requiring a plaintiff to prove harm to competition generally in order to make out a secondary-line RPA claim is at odds with this intent and with the plain language of the statute, which requires that such a plaintiff prove only that "the effect of such [price] discrimination *may* be . . . to injure, destroy, or prevent competition" with a knowing recipient of the benefit of the discrimination or its customers. 15 U.S.C. § 13(a) (emphasis added).

This view of the RPA does not, as some contend, lead to consumer harm. On the contrary, as was the intent of Congress in passing the RPA, it ensures (with certain specifically enumerated statutory exceptions) a level playing field for all distributors, both large and small, in terms of the cost of goods, thereby permitting those distributors to compete based on the efficiencies of their operations rather than on the basis of their ability to leverage a lower price from the seller. This, in turn, helps to ensure that the marketplace will reward the most efficient distributor, rather than simply the seller's favorite buyer or the buyer able to negotiate the lowest price from the seller.

The presumption of competitive harm identified by this Court in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), reflects the prophylactic nature of the RPA. Refusing to apply the *Morton Salt* presumption here would reflect a significant and unjustified scaling back of that principle, which has been repeatedly reaffirmed by this Court. As this Court explained in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460

U.S. 428 (1983), the defendant bears the burden of coming forward with evidence that breaks the causal connection between a price differential and lost sales. Whether a defendant has met this burden is properly a question for the trier of fact.

The "transaction-specific" approach to competition advocated by petitioner would represent a fundamental departure from *Morton Salt* and its progeny as well as from the language and legislative history of the RPA. Under that approach, competition would have to be considered on a transaction-by-transaction basis. Such competition would contemplate only identical commodities and exactly contemporaneous sales. Never before has this Court required an RPA plaintiff to prove that it competed with a favored purchaser on a customer-by-customer, transaction-by-transaction basis. For the Court to now create such a requirement would be fundamentally at odds with the prophylactic nature of the RPA and with the plain language of the Act, which expressly provides that sales of non-identical commodities of "like grade and quality," as well as reasonably contemporaneous sales, fall within the scope of the RPA's prohibition against price discrimination.

The assertions that affirming the lower court would lead to unacceptable uncertainty for sellers and harm to consumers are unfounded. Congress provided sellers with multiple bases within the RPA for justifying price differences due to legitimate pro-competitive factors. Indeed, the RPA is subject to so many defenses and qualifications that some commentators have observed that it is of relatively limited practical effect. Nevertheless, sellers would prefer to weaken it further, and Petitioner, Volvo Trucks North America, Inc. ("Volvo"), seeks to effectively eliminate it altogether as it applies to the sale of heavy trucks and products purchased by wholesalers after receiving a customer order. It is respectfully suggested that the decision to roll back the RPA in that manner is not

one properly for this Court, but rather is a legislative matter for Congress.

ARGUMENT

I. THE RPA PROTECTS COMPETITION GENERALLY BY PROTECTING INDIVIDUAL COMPETITORS FROM PRICE DISCRIMINATION IN SECONDARY-LINE CASES

The RPA was enacted during the Great Depression of the 1930s in response to lobbying by independent wholesalers, brokers and retailers who were complaining of price discrimination by their suppliers in favor of large chain stores. Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the* Morton Salt *Presumption Be Retired,* 48 SMU L. Rev. 1917, 1917 (1995). While the antitrust laws generally protect the process of competition in the market as a whole, the RPA protects competition by addressing "individual competitive situations, rather than . . . a general system of competition." *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945); Terry Calvani & Gilde Beidenbach, *An Introduction to the Robinson-Patman Act and its Enforcement by the Government*, 59 Antitrust L.J. 765, 766 (1991). This philosophy is reflected in the oft-cited Senate report that accompanied the RPA, which stated: "Existing laws [referring to the Sherman and Clayton Acts] have been too restrictive in requiring a showing of competitive conditions in the line of commerce involved; whereas the more immediately important concern is an injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower." S. Rep. No. 74-1502, at 4 (1936). Thus, it has been recognized that both the language and the legislative history of the RPA "demonstrate a very specific intent on the part of Congress to 'strengthen' the provisions of the original Clayton Act, particularly as it applied to secondary line injury occasioned by the presence

of 'power buyers.'" Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of* Morton Salt: *To Save it, Let It Go*, 48 Emory L.J. 1057, 1059 (1999).

In accordance with this philosophy, Congress amended the language of Section 2 of the Clayton Act, which originally prohibited price discrimination only where its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" by adding an alternative standard that prohibited price discrimination where the effect of the discrimination "may be . . . to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a); Gavil, *supra*, at 1059-60. In *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948), this Court recognized that this new provision "was intended to justify a finding of injury to competition" in a secondary-line case "by a showing of 'injury to the competitor victimized by the discrimination.'" 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4).

This Court has recognized that the RPA is, by nature, "prophylactic." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981). That is, the goal of the RPA is to prevent general harm to competition *before it happens*. *Morton Salt*, 334 U.S. at 49. Indeed, Representative Patman "likened the prohibition of injury to individual competitors to an early trip wire, designed to signal competitive injury to consumers at the earliest moment." Gavil, *supra*, at 1071 (citing 80 Cong. Rec. 8115 (1936)). As such, an RPA plaintiff need only show a reasonable possibility of competitive harm. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983); *Morton Salt*, 334 U.S. at 46; *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945). Any standard that requires *proof* of harm to competition generally as a prerequisite to making out a secondary-line claim under the RPA simply cannot be reconciled with the language or

legislative history of the Act, or with this Court's prior RPA decisions.

Volvo and many commentators have asserted that the RPA is out of step with other antitrust laws to the extent that it protects individual competition rather than competition generally, and that the RPA must be scaled back by the courts in order to bring it in line with the other antitrust laws. Often cited as justification for this position is this Court's pronouncement in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that the RPA "should be construed consistently with broader policies of the antitrust laws." 509 U.S. at 220. Such arguments fail to recognize that forbidding a seller from discriminating in price among competing buyers when such discrimination does not fall within one of the statutorily enumerated exceptions *is* consistent with the broader policies of the antitrust laws.

Congress, in passing the RPA, expressed the concern that smaller buyers who were as efficient as or more efficient than larger buyers were being driven out of business due solely to the fact that the larger, less efficient buyers were able to leverage better pricing from suppliers. Congress recognized that price discrimination permitted such "power buyers" to use their size and purchasing power to make up for their lack of efficiency. *See FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) (observing that the goal of the RPA is to ensure "to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.") *See also* Gavil, *supra*, at 1064 (stating that the legislative history of the RPA "reveals how deeply concerned the Act's proponents were with preserving pricing practices that promoted efficiency and innovation in distribution practices" and that "throughout the legislative history, proponents of the Act . . . proceeded on the assumption that equally efficient rivals were being denied equal treatment due to the clout of the prototypical 'chain store'").

One effect of price discrimination is that it can give a less efficient distributor an (economically undeserved) competitive advantage that flows merely from its status as a favored purchaser. Ultimately, a more efficient but disfavored distributor is likely to succumb to its less efficient, but favored, competitor. Congress rightly recognized that this was not a socially desirable competitive outcome. Consumers (and society) are benefited when the competitive process identifies the most efficient competitors. If permitted a level playing field with less efficient buyers, more efficient buyers will be able to offer consumers lower prices or better services, or both. Price discrimination in favor of less efficient buyers undermines this process because competitors are subject to failing not because they are less efficient, but rather merely because they are smaller and thus less able to leverage low prices from suppliers. In this important respect, then, the RPA's goal of eliminating price discrimination among competing buyers is completely consistent with the policies underlying the antitrust laws.

II. THE *MORTON SALT* PRESUMPTION APPLIES WHERE THERE IS SUBSTANTIAL PRICE DISCRIMINATION OVER TIME BETWEEN PURCHASERS IN COMPETITION WITH ONE ANOTHER

First recognized in *FTC v. Morton Salt Co.*, 334 U.S. 46 (1948), and most recently affirmed by this Court in *Texaco v. Hasbrouck*, 496 U.S. 543, 559 (1990), the *Morton Salt* presumption infers that a plaintiff's ability to compete with other purchasers is injured whenever that plaintiff can show that it paid "substantially more for [its] goods than [its] competitors had to pay." *Morton Salt*, 334 U.S. at 46-47. *See also Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) ("[I]njury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time.").

As this Court concluded in *Morton Salt*, it is entirely consistent with the language and legislative history of the RPA to presume competitive harm where there is evidence of price discrimination among competing purchasers over time. Indeed, while concerns of power buyers clearly motivated the passage of the RPA, this Court has held that the RPA is not limited only to situations involving power buyers. *Falls City*, 460 U.S. at 436 (considering and rejecting the argument that the RPA should be applied only in cases involving large buyer preference or seller predation, and observing that although concerns about "the excessive market power of large purchasers were primarily responsible for passage of the Robinson-Patman Act," the text of the Act "is of general applicability and prohibits discriminations generally."). Furthermore, inasmuch as the RPA is a prophylactic statute, *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 561 (1981), such a presumption serves the purpose of stopping harm to competition generally in the "seed" of individual competitive harm, before it has metastasized.

A plaintiff advancing a secondary-line claim under the RPA is entitled to the *Morton Salt* presumption where that plaintiff presents evidence demonstrating two facts: (1) the plaintiff was the victim of substantial price discrimination over time; and (2) the favored purchaser and the plaintiff were in competition with one another at the same functional level.

Here, Volvo does not dispute that other Volvo dealers systematically received better prices on the Volvo trucks they purchased from Volvo than did Respondent, Reeder-Simco GMC, Inc. ("Reeder"). Thus, the first factual prerequisite to the *Morton Salt* presumption is met. Volvo argues, rather, that the second factual prerequisite to the *Morton Salt* presumption is not met here, contending that the factual record does not support a finding that Reeder competed with Volvo dealers who received more favorable pricing than did Reeder.

The undisputed facts, however, show that Reeder did compete with the favored Volvo dealers. For example, uncontroverted evidence demonstrates that both Reeder and the favored Volvo dealers sold to customers in the same geographic area. J.A. 174, 412. Further, Reeder presented evidence of several instances when it competed head-to-head with a favored Volvo dealer for a sale to a customer. J.A. 304-05. Indeed, while Volvo points to testimony that, generally speaking, competition among Volvo dealers for the same sale was "the exception rather than the rule," that testimony actually *establishes* that such competition *did occur*. Other testimony heard by the jury also confirms that Reeder competed with other Volvo dealers. J.A. 174, 412. Taken together, all of this evidence plainly demonstrates that Reeder was in competition with the favored Volvo dealers.

In an attempt to avoid this inescapable conclusion, Volvo asks this Court to compartmentalize the evidence when evaluating whether the second factual prerequisite to the *Morton Salt* presumption is met. By viewing the evidence on a transaction-specific basis, Volvo would have this Court ignore the instances of head-to-head competition, claiming that they cannot support Reeder's RPA claim because in those instances Reeder lost the bid (due, of course, to the price discrimination) and therefore the so-called "two purchaser rule" is not met with respect to those specific transactions. Volvo then dismisses the instances where Reeder did purchase from Volvo (albeit at higher prices than Volvo afforded to other Volvo dealers) and those instances in which Reeder lost a sale to a dealer of another line-make on the grounds that Reeder was not competing with the favored Volvo dealers in those particular transactions. Only after defining competition in this novel manner can Volvo frame the question presented as one of whether an RPA claim exists where the plaintiff does not compete with the favored purchasers. Under the traditional definition of competition, however, it is clear that

Reeder *did* compete with the other favored Volvo dealers and, as such, is entitled to the *Morton Salt* presumption.

The transaction-specific definition of "competition" advocated by Volvo is contrary to the plain meaning of that term in the RPA and is a dramatic departure from any definition of competition ever recognized by this Court in the context of an antitrust case. This Court has repeatedly held that firms are in competition with one another when they seek to sell to the same customers in the same relevant product and geographic market. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (holding that firms effectively compete with each other where a purchaser can practicably turn to those firms as a source of supply); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 359 (1963) (defining the area of competition as the area in which the seller operates and where consumers may purchase). This Court applied such a definition of competition in the secondary-line RPA context in *Falls City*, observing that beer wholesalers compete where they operate at the same functional level and sell the same products to customers in the same geographic area. *Falls City*, 460 U.S. at 436.

There is no principled reason to veer away from this well-settled definition of competition in favor of Volvo's novel transaction-specific approach. Indeed, in accordance with this Court's pronouncement in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993), that the RPA should be interpreted consistently with other antitrust laws, the traditional definition of competition from prior antitrust cases should be applied to the RPA.

The statutory language of the RPA further demonstrates that the traditional definition of competition must be applied in this particular situation. The term "competition" appears two times in Section 2(a): first, in the "general injury" clause of Section 2(a), which forbids price discrimination the effect of which "may be to substantially lessen competition or tend

to create a monopoly in any line of commerce," and then again in the "individualized injury" clause of Section 2(a), which forbids price discrimination the effect of which may be "to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It cannot be disputed that, as used in the general injury clause of Section 2(a), "competition" has the meaning traditionally ascribed to that term in other antitrust contexts. In light of the maxim of statutory interpretation requiring that terms be interpreted to have the same meaning throughout a statute, *see Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932), the term "competition" as used in the individualized injury clause of Section 2(a) must be afforded the same meaning given to that term in the general injury clause of Section 2(a). Inasmuch as Volvo's novel transaction-specific definition of competition differs from the established definition of competition that is clearly applied in the general injury clause of Section 2(a), this Court should reject that definition.

In addition to creating an irreconcilable internal definitional conflict, Volvo's novel transaction-specific view of competition is also at odds with the plain language of the RPA. Under Volvo's transaction-specific view of competition, price discrimination would be actionable in a secondary line case only when a disfavored buyer could prove it was competing with a favored buyer to make the *same sale* to the *same customer*. However, the RPA plainly contemplates that actionable discrimination is not limited to such head-to-head, "same sale/same customer" circumstances.

Under Volvo's transaction-specific approach, discrimination would be forbidden only in exactly contemporaneous sales. The RPA, however, prohibits price discrimination when the sales in question are "reasonably contemporaneous," not only when they are exactly contemporaneous. *See*

James A. Pikl, *The Myth of "Functional Availability" and the Robinson-Patman Act*, 2002 Fed. Cts. L. Rev. 1, 35-38 (2002). Furthermore, the RPA prohibits price discrimination in "comparable" transactions involving goods of "like grade and quality." *FTC v. Borden*, 383 U.S. 637, 643 (1966). Volvo's transaction-specific approach is inconsistent with this notion because it would prohibit discrimination only in transactions involving the exact same goods. *See generally* Pikl, *supra*, at 35-38 (pointing out that a transaction-specific view of competition under the RPA is at odds with the fact that the statute extends to reasonably contemporaneous sales, as well as to comparable transactions involving goods of like grade and quality.)

While Volvo points to this Court's decision in *Falls City* for the proposition that the *Morton Salt* presumption may be overcome by "evidence breaking the causal connection between a price differential and lost sales or profits," *Falls City*, 460 U.S. at 435, it is incumbent on Volvo to come forward with such evidence, and Volvo did not do so. Moreover, the question of whether evidence was presented that was sufficient to break the causal connection between price discrimination and lost sales or profits is one of fact properly left to the trier of fact, particularly where, as here, the plaintiff has presented compelling evidence demonstrating a link between price discrimination and lost sales and profits.

III. ADOPTING PETITIONER'S INTERPRETATION OF THE RPA WOULD EFFECTIVELY REPEAL THE RPA

Were the Court to narrow or abandon the *Morton Salt* presumption or adopt Volvo's novel transaction-specific definition of competition, the consequences to distributors and other small businesses that are RPA "purchasers" would be devastating. Volvo's transaction-specific view of competition, when coupled with Volvo's transaction-specific view of the "two purchaser rule," would effectively repeal the RPA

with respect to lines of commerce involving competitive bidding or wholesale purchases occurring after a customer places its order.[2]

Under Volvo's approach, the RPA would be applicable only in industries where buyers purchase goods for inventory. Thus, price discrimination would be completely permissible in large, and growing, segments of commerce where goods are purchased only after a sale is secured, a segment that includes a large portion of the class 8 truck market. If Congress had intended to exempt such a large segment of commerce from the RPA, it can be safely presumed that it would have clearly manifested that intent in the text of the Act. In fact, neither the language of the RPA nor its legislative history evidences any such intent.

Nowhere in the text of the RPA or in its legislative history is there any indication that Congress intended for the Act to apply to protect only buyers who purchased goods for inventory, or that Congress intended to exempt from the reach of the Act sellers who participated in that segment of commerce where goods are not purchased for inventory. Further, there are no special features about businesses where goods are purchased after a competitive bidding process or after a customer places its order that would justify refusing to apply the RPA in such circumstances. On the contrary, price discrimination would seem to be at least equally problematic in such businesses as in lines of business where goods are purchased for inventory. Price discrimination leads to the same anticompetitive effect in both areas. As this Court has recognized, in enacting the RPA, "Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source." *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963).

[2] Volvo repeatedly asserts in its papers that no harm could possibly have come to Reeder as a result of price discrimination because Volvo had a policy to equalize dealers when they were competing on the same deal. However, were this Court to accept the arguments being advanced by Volvo, Volvo and other sellers *would not even be required to equalize dealers who were bidding head-to-head on the same deal*. This is because only one dealer would ultimately win the bid and, under Volvo's view of the two purchaser rule, none of the unsuccessful bidders could make out a claim under the RPA. Certainly, Congress could not have possibly intended to permit such a result.

Volvo's view of the RPA would also have devastating consequences outside the competitive bidding context. Under Volvo's novel transaction-specific view of competition, in order for a plaintiff to make out an RPA claim, the plaintiff would have to prove that it competed with favored purchasers on a customer-by-customer basis. Simply proving that it sold the same products into the same geographic area as a favored purchaser would not, under Volvo's approach, be sufficient to prove that the plaintiff competed with that favored purchaser. Requiring such proof would raise the evidentiary bar for a RPA claim so high that it would be extremely difficult for a plaintiff to prove such a claim—an outcome plainly inconsistent with the prophylactic nature of the RPA.

Presumably due to the same philosophical differences with the RPA that are expressed in their *amicus curiae* brief in this case, the federal antitrust enforcement agencies have effectively abandoned enforcement of the RPA. As a result, civil actions by private plaintiffs are the last bastion of defense against price discrimination. The substantial raising of the evidentiary bar that would follow from Volvo's transaction-specific view of competition and the two purchaser rule would create a very high evidentiary burden leaving RPA "purchasers" with little defense against price discrimination.

Any roll back of the RPA would have dire consequences for distributors and retailers and, in turn, for consumers and society in general. Sellers would be largely or entirely free to blatantly discriminate among purchasers, giving them near total control over the downstream distribution of their prod-

ucts. Sellers could use price discrimination to "punish" purchasers who engaged in price discounting and other pro-consumer practices that were not looked upon favorably by the seller. Sellers, such as Volvo, who face legal limitations on their ability to terminate distributors and dealers could easily avoid such limitations and accomplish the very same ends through price discrimination. Purchasers would survive only at the pleasure of the supplier. Consequently, purchasers likely would invest more sparingly in their businesses for fear that their investments might vanish should they fall out of favor with the supplier and find themselves on the receiving end of unfavorable pricing.

Society benefits from strong, independent distributors and retailers. Such businesses are the backbone of the American economy. They are the embodiment of the American dream of self-employment and self-sufficiency. Such businesses, no matter how small, deserve the opportunity to compete on a level playing field with their larger brethren, in order that the best competitor might prevail, not merely the largest. This notion of meritocracy, which dates back to the founding of our Nation, was the animating spirit of the RPA. The views advanced by Volvo simply cannot be reconciled with the intent of Congress. If those views are accepted by this Court, it would work an irreparable harm to the RPA and to small businesses throughout the United States.

IV. THE CONTENTIONS THAT AFFIRMING THE COURT BELOW WOULD RESULT IN COMPLIANCE PROBLEMS AND PRICE RIGIDITY ARE MERITLESS

Several manufacturer-oriented organizations have submitted *amicus curiae* briefs in which a common theme emerges. Those *amici*, and Volvo, contend that affirming the ruling of the Eighth Circuit below would have the effect of putting a pricing straitjacket on manufacturers, who would simply end all discounting for fear of subjecting themselves to RPA

liability. Those contentions should be dismissed as nothing more than overstatements designed to bring about a desired outcome.

As a preliminary matter, it must be remembered that the RPA, by its terms, is of limited scope. It applies only to "sales" of "commodities." 15 U.S.C. § 13(a). The sales must be reasonably contemporaneous. *Id.* The commodities must be of "like grade and quality." *Id.* The Act applies only when the commodities are "sold for use, consumption or resale within the United States." *Id.* The same seller must make the discriminatory sales. *Id.* Two different buyers must purchase from the same seller. *Id.* Those buyers must compete at the same functional level. *Texaco v. Hasbrouck*, 496 U.S. 543 (1990). The transaction must have been "in commerce," meaning the product sold must physically cross a state boundary. 15 U.S.C. § 13(a); *Standard Oil Co. v. FTC*, 340 U.S. 231, 236-37 (1951). And, of course, there must be a difference in price charged to the two buyers. 15 U.S.C. § 13(a). Only if all of these "gatekeeper" elements are satisfied can a plaintiff make out a prima facie RPA claim.

Moreover, Congress expressly exempted certain types of price discrimination from the reach of the RPA. The RPA recognizes a defense to price discrimination based on "due allowance for difference in the cost of manufacture, sale or delivery resulting from the different methods or quantities in which such commodities are to such purchasers sold or delivered." 15 U.S.C. § 13(a). This provision, known as the "cost justification defense," offers sellers significant pricing flexibility. Likewise, the "meeting competition defense," which permits price discrimination by a seller where the seller is attempting in good faith to meet a competitor's price, 15 U.S.C. § 13(b), also affords broad pricing flexibility to sellers seeking to offer competitive pricing.

Should this Court affirm the ruling below, sellers will continue to have significant pricing flexibility. In an attempt to

add support for their argument to the contrary, *amici* supporting Volvo raise a number of policy arguments that simply do not have merit. For example, the American Petroleum Institute argues that "[b]efore the decision below, sellers could be comfortable . . . charging different prices to dealers, so long as it was clear that those dealers were not competitors for the same business" and even goes so far as to claim that "[a] seller could no longer rely on identification of separate geographic markets" if this Court were to affirm the decision below. Brief of the American Petroleum Industry as *Amicus Curiae* in Support of Petitioner at 8, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. May 20, 2005). However, as explained above, here there is ample evidence that Reeder was in competition (as that term has traditionally been understood in antitrust jurisprudence) with the favored Volvo dealers and that Reeder and the favored Volvo dealers competed for and made sales in the same geographic area. In light of such evidence, the concerns expressed by the American Petroleum Institute are misplaced. Affirming the decision below would be well within the boundaries of established RPA jurisprudence.

The American Petroleum Institute also argues that restricting a seller's ability to engage in price discrimination will cause sellers to be more reluctant to adjust prices in response to market conditions. Brief of the American Petroleum Industry, *supra*, at 8. Here again, this statement ignores well-established RPA jurisprudence. The RPA plainly contemplates that a seller is permitted to change its prices when market conditions change. In fact, the RPA expressly says as much, virtually word-for-word: "[N]othing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for . . . the goods concerned." 15 U.S.C. § 13(a). Many courts have recognized that changing market conditions can justify pricing differentials. *See, e.g., Comcoa, Inc. v. NEC Tels., Inc.*, 931

F.2d 655, 661 (10th Cir. 1991); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988).

The intent of Congress, as evidenced through the language of the RPA, was that where a plaintiff could demonstrate price discrimination that met certain criteria, then the burden would shift to the defendant to come forward with evidence that the discrimination was justified. *See* 15 U.S.C. § 13(b) ("Upon proof being made . . . that there has been discrimination . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section . . . .") The concerns expressed by the American Petroleum Institute and other *amici* supporting Volvo reflect a deep-seated discontentment with that statutory structure. Simply put, they do not want to bear the burden of having to justify price discrimination when a plaintiff makes out a prima facie case. Their unhappiness with the choices made by Congress is not a reason for this Court to undo this law. The repeal or revision of the RPA is for Congress to choose to do, and the fact that Congress has elected not to act despite a steady stream of calls to do so over the past several years, even decades, is still more reason for this Court to take great care to honor existing precedents and established RPA jurisprudence.

In its *amicus curiae* brief, the National Electric Manufacturers Association contends that if manufacturers are not permitted to engage in price discrimination, then resellers will be unable to differentiate themselves in the minds of their customers on the basis of price. Brief of the National Electrical Manufacturers Ass'n as *Amicus Curiae* in Support of Petitioner, at 9, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (U.S. May 20, 2005). This contention is both inaccurate and rather telling. It is telling insofar as it suggests that resellers use special pricing concessions from their suppliers to "differentiate themselves" from other, less favored resellers in the mind of the customer on

the basis of price. This is precisely why Congress passed the RPA: Congress thought it unfair that a reseller would be able to win business away from its competitors based solely on the fact that it was the beneficiary of price discrimination by a supplier. Thus, this argument serves not as a point in favor of price discrimination of the sort at issue here, but as a compelling argument against it.

The statement is inaccurate because it wrongly assumes that if different resellers pay the same price for an item, they will price that item the same when offering it for resale. While a reseller's resale price will be determined in part by its cost of goods, that resale price will also be affected by the reseller's profit margin needs and desires, and those needs and desires will vary among resellers. The automotive industry serves to demonstrate this point. Typically, all car dealers of a particular line-make pay the same price for the cars they purchase from the manufacturer. Yet we all know from personal experience and observation that car prices to consumers vary from dealer to dealer, even on the exact same model equipped with the same extras. This is because one dealer may elect to pursue a low margin-high volume philosophy, while another may stress serviee over price. Similarly, one dealer might run a highly efficient operation and thus be able to offer a smaller mark-up as compared to a different dealer that has a less efficient operation. In sum, even when the seller charges them the same price for the goods at issue there is ample opportunity for resellers to differentiate themselves in the mind of a customer on the basis of price.

Yet perhaps the most insidious notion advanced in support of reversing the decision of the court below is that consumers are benefited through lower prices as a result of Volvo's inherently discriminatory method of pricing its trucks. Far from generating lower prices for customers, Volvo's pricing mechanism is an artifice used by Volvo (and most, if not all, other manufacturers of class 8 trucks) to *keep prices high.*

The pricing mechanism works as follows. First, a manufacturer sets an artificially high dealer list price. This forces dealers to approach the manufacturer for a pricing concession on each potential deal, which, in turn, enables the manufacturer to control dealer profit margins. This pricing mechanism also permits the manufacturer to "steer" deals to—and away from—particular dealers through price discrimination, thereby ultimately permitting the manufacturer to exercise a degree of control over its dealers that is at odds with federal and state laws designed to limit such control. This system, which can be used to generate plainly anti-consumer outcomes, is not one worthy of preserving, especially at the expense of the entire RPA.[3]

When Congress passed the RPA, it expressed its desire that purchasers at the same functional level have a level playing field in terms of the cost of goods. Congress recognized that in certain circumstances price differences would not be an evil, and even would be desirable, and thus Congress created certain statutory defenses to account for such circumstances. In so doing, Congress made a value judgment regarding the proper balance between socially desirable goals such as pricing flexibility and the societal ills Congress perceived in price discrimination. This Court should not disturb that balance by heeding the invitation of Volvo and supporting *amici* to legislate from the bench.

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[3] Volvo labels its pricing scheme as "competitive bidding." That is a misnomer. Volvo's sales process does not involve a purchaser soliciting bids to obtain the lowest possible price, as with a requirements contract for a specified period. Instead, Volvo forces its pricing system on purchasers every time they seek to purchase a truck. This "competitive bidding" actually enables Volvo to inflate prices.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

WAYNE A. MACK *
J. MANLY PARKS
JAMES H. STEIGERWALD
DUANE MORRIS LLP
One Liberty Place
Philadelphia, PA 19103
(215) 979-1000

* Counsel of Record

Counsel for Amici Curiae

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